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DONALD HOLT,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 79-86-PC

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal of a suspension which is before the Commission pursuant to §230.44(1)(c), Stats., (1977). A hearing was held before hearing examiner Anthony J. Theodore on June 15, 1979, and the parties filed briefs concluding on September 4, 1979.

FINDINGS OF FACT

1. At all relevant time the appellant has been a permanent employe in the classified service in the state patrol, most recently in a position classified as a sergeant at District 2 - Waukesha.
2. On January 11, 1979, the troop, or unit, that appellant supervised was scheduled to have target practice.
3. Trooper Walker, a member of the troop and a subordinate of the appellant, was scheduled to work light duty because of medical convalescence following eye surgery. This meant he would not be uniform, would be unarmed, and would not be driving.
4. At about 10:30 that morning Trooper Walker began drinking and had consumed three or four bottles of beer by approximately 11:45 a.m.

5. At about 11:54 a.m. the appellant accompanied by and driving a patrol cruiser regularly assigned to Trooper Steinbergs, another member of the unit, arrived at Trooper Walker's residence and picked up Trooper Walker to give him a ride to District 2 headquarters.

6. They proceeded to District 2 headquarters. The appellant was driving, Trooper Steinbergs was in the right front seat, and Trooper Walker was in the right rear seat. Although the appellant was not aware of it during the time of this trip, there was a deodorant stick or air freshener installed under the front dash of the car.

7. During the trip to headquarters the appellant smelled something which he thought was a strong odor of cologne or after shave or something else and it brought to mind a former employe who used a strong cologne or after shave to mask his drinking. The appellant took no action at this time in connection with this situation.

8. During the trip to headquarters Trooper Steinbergs did not smell any odor that he thought was that of an alcoholic beverage.

9. Trooper Steinbergs did not smell any odor that he thought was that of an alcoholic beverage on Trooper Walker the remainder of that day, although he spoke to him and was within several feet of him from time to time the remainder of the day.

10. Following their arrival at headquarters, Trooper Walker spoke briefly to Col. Goetsch in the parking lot. It was cold and the wind was blowing.

11. At this point Col. Goetsch did not smell any odor that he thought was that of an alcoholic beverage.

12. The appellant and troopers Walker and Steinbergs then reoccupied the same car in the same positions and proceeded to the Walworth County range, arriving about 1:02 p.m.

13. The appellant assigned trooper Walker to operate the range control equipment in the control booth.

14. The control booth is about six feet by six feet square and is completely enclosed except for an access door and an overhead vent.

15. The appellant was in the booth with Trooper Walker for about five minutes between about 1:05 and 1:10 p.m. before the shooting exercise commenced. During this period he instructed trooper Walker in the operation of the range controls.

16. At this time the appellant smelled something that he thought might be the odor of an alcoholic beverage. However, he was not very certain of the smell and took no further action but left the booth to supervise the activity on the range.

17. At approximately 2:20 p.m., Col. Goetsch, Division of Enforcement and Inspection, arrived at the range to observe the troop's activity, and entered the control booth.

18. Col. Goetsch smelled the odor of what he believed to be an alcoholic beverage on Trooper Walker's breath.

19. Col. Goetsch also observed that Trooper Walker was having difficulty manipulating the target controls.

20. Col. Goetsch discussed his observations with appellant and made arrangements with him to leave the range site with Trooper Walker. The three left in the same car (Trooper Steinberg's).

21. While in the car the appellant could smell quite strongly an odor that he believed to be that of an alcoholic beverage.

22. Chemical breath tests were administered and a urine sample was taken from Trooper Walker about 3:30 p.m. Analysis of this sample resulted in a finding of .026% by weight blood alcohol.

23. Prior to January 11, 1979, the appellant had concerns that Trooper Walker might have had a drinking problem, based on observations of Walker drinking at home shortly after noon one day and Walker's despondency about his eye surgery and possible forced early retirement.

24. The following day, January 12, 1979, the appellant prepared a memo to Captain Jorgensen, Commanding Officer of District 2, Respondent's Exhibit 2, which was in essence a report of the January 11th incident.

25. Trooper Walker was suspended for two days without pay.

26. The appellant was suspended for one day without pay for having failed to investigate a suspected work rule violation.

27. The appellant's suspension was effected by the appointing authority on the recommendation of Captain Jorgensen and with the concurrence of Col. Goetsch and other high ranking management employees.

28. In making the decision as to appellant's suspension, the management employes relied on appellant's written report, Respondent's Exhibit 2, a second written report prepared by appellant, Respondent's Exhibit 4, and other written reports.

29. At no time prior to the imposition of his suspension was the appellant given a hearing nor was he given a predisciplinary interview where he had knowledge that his supervisors were considering taking

disciplinary action against him.

30. However, the appellant did have less formal conversations about the incident with both Col. Goetsch and Captain Jorgensen prior to the imposition of the suspension.

31. Prior to the imposition of the suspension the appellant was interviewed by his immediate supervisor, Lt. Clark, who in his analysis of the matter did not recommend to Capt. Jorgensen that any disciplinary action be taken against appellant.

32. At the time of the incident the appellant had approximately 13 years of employment in the state patrol, with a good record and no disciplinary action of any kind, including no letters of criticism or reprimand.

33. Prior to the imposition of the two-day suspension Trooper Walker had been suspended once and demoted once.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. The burden of proof is on the respondent to demonstrate that the discipline imposed was for just cause.

3. The respondent has demonstrated just cause for the imposition of some discipline.

4. The respondent has not demonstrated just cause for the amount of discipline imposed here.

5. The one-day suspension imposed by the respondent should be modified by its reduction to a written reprimand and the appellant's

personnel file should be corrected to reflect this and he should be paid the lost salary and benefits resulting from his suspension.

OPINION

This is an appeal pursuant to §230.44(1)(c), Stats. (1977), Section 230.44(4)(c), Stats. (1977) provides in part:

"After conducting a hearing on an appeal under this section, the commission shall either affirm, modify or reject the action which is the subject of this appeal. If the commission rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision." (Emphasis supplied).

Prior to the addition of the language with respect to modification by chapter 196, Laws of 1977, §121, personnel appeals of this type of disciplinary action were to the Personnel Board, which could not modify the discipline but had to affirm or reject it in toto. See §16.05(1)(e), Stats. (1975): "... The board shall either sustain the action of the appointing authority or shall reinstate the employe fully."

In the opinion of the Commission, the current statute clearly requires a two step analysis of a disciplinary action on appeal. First, the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. See, e.g., State ex rel Iowa Employment Security Commission v. Iowa Merit Employment Commission, 231 N. W. 2d 854, 857 (1975), where it was acknowledged that

under a statutory provision, Iowa Code Anno. §19A.14, that following a de novo hearing before the Commission it could either "affirm, modify, or reverse," the Commission "even when cause for employe discipline is shown has statutory discretion to decide what that discipline should be."

In this case the appellant was charged with neglect of duty in failing to take the initiative to determine whether Trooper Walker had reported for work with alcohol on his breath.

The Wisconsin Supreme Court has defined "just cause" in the context of employe discipline as follows:

" ... one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works." State ex rel Gudlin v. Civil Service Commn., 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965); Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974).

There can be no question that the consumption of alcoholic beverages by Trooper Walker in the manner found here would fit within this definition of just cause. There also can be no question that the appellant's failure to take earlier action on this matter could be said to have had a tendency to and did impair the efficiency of his unit. The first question which must be resolved on this appeal is whether the appellant's failure to take earlier action was due to a "deficiency" on his part, or, put another way, whether the failure to take earlier action constituted, under all the facts and circumstances, a neglect or failure of his duty to supervise.

The respondent argues that given all the facts and circumstances

the appellant should have taken steps before being prompted by Col. Goetsch, to investigate whether Walker had been drinking. The appellant argues that the facts and circumstances supported only "mere suspicions" that Walker had been drinking and therefore, it would not have been appropriate to have taken further action.

There are three factors that are of particular significance to the Commission in this regard:

1. When the appellant first picked up Trooper Walker he smelled a strong odor of cologne or after shave or "something else" and this brought to mind a former employe who had used a cologne or after shave to mask his drinking.

2. In the control booth in the range the appellant smelled something that he thought might be the odor of an alcoholic beverage.

3. The appellant had concerns, which were not insubstantial, before the day in question, that Trooper Walker might have a drinking problem.

These factors provide more than "mere suspicions." Furthermore, it is apparent that there was available a range of approaches to this issue in addition to that of either having confronted Walker directly about possible drinking or having done nothing. It is noteworthy in this regard that Col. Goetsch took no direct action in this matter until after he had smelled what he thought was alcohol in the enclosed setting of the booth and had observed Walker's difficulty manipulating the range target mechanism. The appellant could have used the same or similar methods to check Walker's condition short of a direct confrontation.

The Commission recognizes that the situation was not clear cut. While the appellant's concerns should have constituted more than mere suspicions, he certainly was not presented with overwhelming evidence that Walker had been drinking. Col. Goetsch had an advantage in that he entered the enclosed control booth after Walker had been there for over an hour and the alcohol fumes had an opportunity to accumulate. However, while it is a close question, the Commission is of the opinion that the appellant's failure to take earlier action with respect to Trooper Walker constituted a failure of his duty to supervise effectively his subordinates which contributed to the continuation of the impairment of the performance of the troop caused by Trooper Walker's drinking.

While the Commission concludes that there was cause for the imposition of discipline in this case, it also concludes that the amount of discipline which was imposed was excessive and must be modified.

As noted above the fact situation facing the appellant was by no means clear-cut. Furthermore, in this case, Trooper Walker, who had been drinking before coming on duty and who had a not insubstantial prior disciplinary record, received a two-day suspension. Sgt. Holt, who failed to take action to detect Walker's drinking under circumstances that did not present a clear obligation to act, received a one-day suspension.

Given the small number of days of suspension involved, the Commission does not believe that it is accurate to characterize Walker's suspension as twice as severe as Holt's suspension, although numerically

it was twice as long. In both cases the respondent imposed serious disciplinary measures, suspensions, which were of short duration.

Captain Jorgensen testified both on direct and cross-examination as to his rationale for recommending a one-day suspension with respect to Holt as opposed to less severe disciplinary action. He referred to the seriousness of the Walker incident and repeatedly to the fact that Sgt. Holt, in his report on the Walker situation, had recommended a suspension of from 5 to 30 days for Walker depending on the level of blood alcohol that might have been determined.

In the opinion of the Commission, although Walker's actions were serious, Holt's actions certainly could not be characterized as an obvious or exacerbated neglect of duty. The Commission sees a very substantial degree of difference in the relative culpability involved in the actions or behavior of the two employes. As to what Holt recommended as discipline for Walker, while this is some evidence of the seriousness of Walker's behavior it cannot override the actual length of the suspension imposed on Walker by management.

Thus in the Commission's opinion the one-day suspension imposed on Holt was excessive in and of itself, and appears more clearly as excessive when compared to the two-day suspension imposed on Walker. Under all the facts and circumstances presented by this record, it is the opinion of this Commission that while there is just cause for some discipline against the appellant, there is not just cause for a one-day suspension, and the action taken by the respondent should be modified to provide for a written reprimand.

There are a number of collateral matters that should be addressed. With respect to finding 16, the appellant testified at the hearing as follows:

" ... I thought I smelled something that I can't say that I thought was an alcoholic beverage at that time nor can I say that it was first identified when Col. Goetsch brought it to my attention. It was just a brief something that I smelled." T. p. 147-148.

In his report that was prepared the day after the incident, Respondent's Exhibit 2, the appellant stated: "While in the control booth, I thought I detected the odor of an alcoholic beverage on Trooper Walker's breath ..."

Given the equivocal nature of the appellant's direct testimony quoted above and the fact that the report was prepared almost immediately after the event in question, the Commission believes the evidence supports the factual conclusion set forth in finding 16.

The appellant has objected to respondent's post-hearing brief as untimely. The brief was due 14 days after respondent's counsel received a copy of the transcript on July 31, 1979. She indicates that she spoke to the appellant on the due date, August 14, 1979, indicated to him that the brief might not be typed on that date, and that the appellant did not indicate any objection to the brief being filed within the next few days. The brief eventually was filed August 17, 1979. The appellant's objection to this brief is overruled.

The question was raised as to whether there was a work rule violation, and if not whether this constitutes an absence of just casue. While the Commission believes there was a work rule violation (DOT Work Rule I, 2." Neglecting job duties or responsibilities."), it does not believe,

in any event, that as a general proposition a work rule violation must be proven to establish just cause for discipline.

State law currently does not require that an employe be afforded a hearing before the imposition of discipline. However, the Commission recommends that the respondent, and appointing authorities generally, consider providing at least a limited type of hearing in most cases where serious discipline of the sort imposed here is under consideration. Such a pre-disciplinary hearing would afford the employe an opportunity at least to give his or her side of the story and to raise any mitigating circumstances prior to a decision being made. In this case there were a number of reports prepared and conversations with the appellant prior to the imposition of discipline. However, the appellant was never given explicit notice that he might be disciplined nor an opportunity to speak in his own behalf with respect to such charges. Such an opportunity would have provided the appellant an opportunity to have presented facts, mitigating circumstances and arguments in his behalf, and would have given the respondent more complete information on which to base a decision. While such a procedure of course would have consumed a certain amount of time, when one considers the time spent on reports and conferences, including post-disciplinary conferences involving the appellant, it suggests the possibility that a pre-disciplinary hearing might have effected net savings of time and resources.

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ORDER

The action of the respondent suspending the appellant for one day without pay is modified and this matter is remanded to the respondent for action in accordance with this decision.

Dated: Nov. 8, 1979. STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Charlotte M. Higbee
Commissioner

AJT:jmg

10/10/79